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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]

JUNIUS IRVING SCALES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

	PAGE
Interest of Amicus	1
Question to be Argued	2
The Statute and the Indictment	2
Argument:	
The Membership Provisions of the Smith Act and the Indictment in This Case Violate the First Amendment to the Constitution	3
Conclusion	9

Citations

CASES:	
Dennis v. United States, 341 U. S. 494	2, 3, 4, 5, 8, 9
Frankfeld v. United States, 198 F. 2d 679, 684	6
Yates v. United States, 354 U. S. 298	8, 9
STATUTE:	
18 U. S. C. 2385	2

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Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consent of the parties, filed with the Clerk of the Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of constitutional rights which are fundamental to the democratic way of life. It has no other program, either political, economic, social or philosophical.

The re-affirmation of petitioner's conviction on rehearing by the United States Court of Appeals again brings before this Court the so-called "membership" provisions of the Smith Act. *Amicus* believes that this conviction is

inconsistent with the First Amendment freedoms of speech and association and that the constitutional questions which it raises are distinct from those already considered by this Court in the *Dennis* case. Significant issues are presented, the resolution of which will have a vital effect on freedom of political discussion and association in America today. Amicus has no interest in the ideas or beliefs of this petitioner and, accordingly, addresses itself solely to what it believes to be the questions of principle here involved.

Question to Be Argued

Amicus believes that the central civil liberties issue in this case is the relationship between the statute and the indictment laid thereunder and freedom of speech and association. Accordingly, this brief will be devoted solely to a discussion of the validity of the statute and the indictment, under the First Amendment to the Constitution.

The Statute and the Indictment

The petitioner in this case was indicted and convicted under the membership provisions of Section 2 of the Smith Act which, together with the organizing provisions, read as follows:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government [in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—shall be fined not more than $10,000 or imprisoned not more than 10 years, or both. * * *" 18 U. S. C. 2385.

The indictment charges:

1. That the Communist Party of the United States was during the times alleged, a group of persons who

teach and advocate the overthrow of the government of the United States by force and violence as speedily as circumstances would permit, and

2. That the defendant was a member of the said Communist Party knowing that it advocated the doctrine charged in paragraph 1, and intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

ARGUMENT

The Membership Provisions of the Smith Act and the Indictment in This Case Violate the First Amendment to the Constitution

The decision of this Court in *Dennis* v. *United States*, 341 U. S. 494, is the starting point for any discussion of the constitutionality of the membership provisions of the Smith Act. That case upheld the convictions of a group of Communist Party leaders for conspiracy to violate the advocacy and organizing provisions of Section 2 of the Smith Act. The defendants were convicted of conspiring to (1) organize as the Communist Party of the United States a group of persons who advocated the overthrow of the government by force and violence and (2) advocate the duty and necessity of overthrowing the government by force and violence.

The prevailing opinion, written by Mr. Chief Justice Vinson, recognized that legislation punishing political speech is permitted under the First Amendment only when the speech in question, considering the circumstances in which it occurs, gives rise to a clear and present danger of a substantive evil which Congress has the power to prevent. In *Dennis*, the substantive evil was an attempt to overthrow the government by force and violence. The

requisite clear and present danger was held to exist in both of its aspects, first, the nature of the defendants' activities—

> "the formation by petitioners of * * * a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action. * * * It is the existence of the conspiracy which creates the danger." 341 U. S. at 510, 511.

and second, the setting in which they occurred—

> "coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned * * * " 341 U. S., at 511.

Both aspects of the clear and present danger test were emphasized in the statement,

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U. S. at 516.

Under *Dennis*, not all advocacy of the doctrine of violent overthrow may be punished. Only such advocacy as creates a clear and present danger, considered in the setting in which it occurs, can constitutionally be criminalized. Although such doctrine is likely to arouse the strongest hostility in the community at large, it is nevertheless protected by the constitutional guaranty of free political debate, absent clear and present danger.

The elements of the statutory crime of membership stand in sharp contrast to the activity punished in *Dennis*. They are:

> 1. That the defendant belonged to the organization in question,

2. That the organization to which the defendant belonged advocated the overthrow of the government by force and violence and

3. That the defendant knew such advocacy to be the purpose of the organization.

On its face, the statute punishes knowing membership in a group advocating the doctrine of violent overthrow even where the defendant disagrees with such advocacy. The indictment in the instant case seeks to obviate this result by alleging as an additional element that the defendant intended to bring about the overthrow of the government by force or violence as speedily as circumstances would permit. The government here relies upon the holding in *Dennis* that such an intent is a necessary part of an offense under the advocacy and organizing provisions of the statute. *Dennis* reached this conclusion on the ground that, "Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow" 341 U. S. at 499. But no such inference justifies importing an intent requirement into the membership provisions of the statute. Indeed common experience concerning the likelihood of disagreement within political organizations points to the opposite conclusion.

But even if the statute is interpreted as permitting the portion of the instant indictment which charges an intention to bring about violent overthrow as speedily as circumstances permit, the elements of the membership offense may be proved by evidence which falls far short of that required by the Constitution. The only act which must be shown is that of membership or association. The individual charged need never have engaged in any other conduct designed to further the forbidden teaching. He need not himself have engaged in any advocacy. Guilty knowledge can be found from evidence that the defendant was acquainted with the literature on which the prosecution

relies to show that the organization advocated the doctrine of violent overthrow. Or it might be enough if the defendant attended meetings and heard speeches which the jury decides expressed the prohibited doctrine. And an unlawful intent may be found by a jury from the act of membership, coupled with guilty knowledge. With no overt act other than membership to guide it, the jury, seeking knowledge and intent, is "adrift on a sea of speculation." The emphasis is on what the defendant thinks rather than what he does. Since the crux of the crime is association with groups advocating violent revolution, the danger is great that convictions will be based not on the acts or even the state of mind of the defendant but rather on a general antipathy towards those with whom he has associated.

How can membership in a group advocating violent overthrow unaccompanied by any other overt act, even when coupled with guilty knowledge and intent, create a clear and present danger? The answer offered by the court below was to treat such membership as participation in a conspiracy. In *Frankfeld* v. *United States*, 198 F. 2d 679, 684, Judge Parker said:

> "Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged."

After quoting this passage in its opinion in the first appeal of this case, the court below added,

> "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purpose; and all that the statute does is apply

this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government." 227 F. 2d 581, 587.

This position ignores crucial differences between speech, crimes and ordinary criminal conspiracies. In so doing, it violates fundamental constitutional principles. The ordinary criminal conspiracy has for its purpose the accomplishment of a single objective, be it bank robbery or espionage. The purpose is clearly criminal and there can be no ambiguity about the state of mind of one who knowingly participates in the common enterprise. On the other hand, the basic activity of a group engaged in advocacy—political speech—has a high social value, receives special protection under fundamental law and becomes criminal only under exceptional circumstances. Moreover, a revolutionary political group invariably has a complex program of social, economic and philosophical objectives, many of which are likely to bear no necessary relationship to the prohibited advocacy. It is a matter of common knowledge that such groups openly seek the support of persons of diverse views, using rhetoric drawn from many different political and social traditions. Whether we consider Marxism-Leninism, corporate fascism or home-grown racism, we are likely to find political programs which deal with many questions other than the desirability of violent overthrow. Thus, an individual may join a group which advocates violent overthrow in order to work for other parts of its program or he may join to make an effort to change that part of its platform. He may not, in fact, interpret its texts as advocating revolution. He may join at a time when the group's position is in doubt or in process of change towards or away from such advocacy. He may join at a time when external conditions are such that the forbidden advocacy presents no clear and present danger and, having done so, may have difficulty in predicting exactly when changed circumstances will lead a court to hold otherwise. Or he may join a group in order to discuss the doctrine of violent revolution without, however,

wishing to participate in any advocacy or other activity calculated to bring about such an objective.

In each of these cases guilty knowledge and intent could be found from evidence which points to no overt act other than that of joining. Because of the strong antogonism which revolutionary doctrine arouses in the community, the danger is great that such findings will be made with ease. The result will be suppression of political speech and association which realistically do not present any clear and present danger of an attempt to overthrow the government by force.

To legally assimilate group speech crimes to ordinary criminal conspiracies is to ignore the vital differences between them. To apply the harsh conspiracy rule of imputed guilt to the members of a radical political group is contrary to basic principles of fairness and political liberty. And, as pointed out above, requiring a guilty state of mind affords little, if any, protection against the dangers of unfairness which are inherent in a statute punishing membership.

The law which is shaped today in dealing with this Communist defendant may determine on some tomorrow whether we will face a repetition of the suppression which characterized many World War I Espionage Act prosecutions and post-World War I prosecutions under state syndicalism statutes. The clear and present danger test which grew out of these chapters of history was designed to provide some limiting principle in dealing with the power of government to punish speech which poses no significant threat to the community. In the *Dennis* case, that doctrine was expanded to permit, under some circumstances, the punishment of revolutionary advocacy even though no imminent threat from the defendants' teaching was demonstrated. The government argued that it should not be compelled to wait until the eve of an attempt.

However, in *Yates* v. *United States*, 354 U. S. 298, this Court limited the broad holding of *Dennis* so as to permit

a conviction only where there was proof of incitement to unlawful action. We suggest that if a conspiracy to advocate the violent overthrow of the government may not constitutionally be punished absent such incitement, then surely mere membership in an organization may not be punished despite proof that the defendant had knowledge that the organization did advocate the violent overthrow of the government.

The validation of convictions under the first federal statute which has sought to punish mere membership in groups advocating revolutionary doctrine, will have a damaging effect on the characteristically American habit of expressing political and social views by joining the countless groups of all types that dot our national scene.

It is appropriate to ask, therefore, what great interest is to be served by the tool which the government seeks permission to use. Whenever organized advocacy presents a significant threat, surely the requirement of charges and proof modeled on the *Dennis* and *Yates* cases does not impose an unfair burden on the government. Conversely, it is difficult to see how inability to punish membership involves such risk that fundamental principle should be sacrificed.

CONCLUSION

For the foregoing reasons, we urge that the judgments below be reversed.

Respectfully submitted,

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